

BEFORE THE
Communications C
WASHINGTON, D.C. 20554

In the Matter of)	
)	
Amendment of the Commission's Space)	IB Docket No. 02-34
Station Licensing Rules and Policies)	

To: The Commission

PETITION FOR PARTIAL RECONSIDERATION

Northrop Grumman Space Technology and Mission Systems Corporation

(“Northrop Grumman”), by counsel and pursuant to Section 1.429 of the Commission’s Rules (47 C.F.R. § 1.429), hereby seeks reconsideration of a portion of the Commission’s *First Report and Order* in the above-captioned proceeding (“*First R&O*”).¹ Specifically, Northrop Grumman believes that the Commission erred in the *First R&O* in its determination to apply certain aspects of the new rules selectively to already pending applications. The Commission does not explain adequately its reasons for establishing this policy. In fact, there are no discernable benefits to this approach, while following it arbitrarily distinguishes between similarly-situated applicants and will have a substantial negative impact on Northrop Grumman’s applications in the V-band and Ka-band, which have been pending before the Commission for six years.²

Of particular concern to Northrop Grumman is the Commission's proposal to apply the new rules imposing a bond-posting requirement upon any licenses ultimately granted to some of the applicants with pending applications, yet not to apply the bond requirement to

¹ *Amendment of the Commission's Space Station Licensing Rules and Policies*, 18 FCC Rcd 10760 (2003).

² See, e.g., Applications of TRW Inc., FCC File Nos. SAT-LOA-19970904-00080 thru -00084 (filed Sept. 4, 1997) and SAT-AMD-19971222-00219 (filed Dec. 22, 1997). TRW Inc. is Northrop Grumman's predecessor in interest in the prosecution of these applications.

other similarly-situated applicants. This decision is arbitrary in several critical respects. First, this approach dramatically upsets the long-settled expectations of these applicants, all of which have been awaiting Commission action on their applications for many years. Second, this approach treats some pending applicants unfavorably as compared with other pending satellite license applicants, many of which sought authority years later, even though both comparable satellite services are new, and the systems in the two services will be direct competitors of one another in the marketplace for broadband telecommunications services. The Commission is thus arbitrarily imposing additional start-up costs upon some prospective operators based solely on the fact that the Commission has taken a longer period of time to process their applications. The Commission offers no rationale for this disparate treatment, and no such justification exists.

In Northrop Grumman's view, the Commission should not apply the bond-posting requirement to any licensees with initial applications that were filed prior to the effective date of the new rules. At the very least, and given the current difficulties being experienced in the satellite industry, the Commission should correct actions that have the effect of singling out some applicants for additional, inconsistently imposed cost burdens.

Argument

I. The Commission's Decision To Impose The New Bond-Posting Requirement Upon Only Some Pending Applicants Is Arbitrary and Unreasonable.

The Commission explains in some detail its basis for concluding that it has authority to impose the newly adopted satellite licensing requirements on certain pending applications (*see First R&O* at 105-6 (¶¶ 276-77)). The Commission, however, provides scant explanation of the policy rationale prompting it to apply its new bonding requirement to pending applicants, devoting its discussion instead to its legal theory that it can freely apply the new procedures to pending applications. Moreover, the Commission offers no explanation at all for

its apparent decision to apply this requirement on a *selective basis*. Instead, the Commission simply asserts, without elaboration, that considering pending applications for V-band and Ka-band NGSO systems under existing procedures would frustrate its goals of allowing “faster service to the public, while maintaining adequate safeguards against speculation.” *First R&O* at 106 (¶ 279). It does not say why these conclusions apply uniquely to these groups, as distinct from other pending applications. In particular, consistent with the language in the *First R&O* singling out V-band and Ka-band applications for treatment under the new rules, including the bonding requirement (*First R&O* at 107 (¶ 281)), the FCC’s International Bureau Staff has clearly stated that pending Ku-band NGSO applications will not be subject to the new licensing rules, including the bond-posting requirement.³

Northrop Grumman does not agree with the Commission’s proffered justification for the proposition that, as a general matter, the new rules can be freely applied to applications already on file. Northrop Grumman observes, however, even assuming, *arguendo*, that the Commission has such an ability in some situations, that the Commission has done nothing to justify its selective approach in this instance. With respect to the bond-posting requirement, it is evident that every applicant seeking a new satellite license prior to 2003, including the V-band and second round Ka-band applications that were filed in 1997, would have based their start-up costs on the application fees themselves plus all other legal and engineering costs necessary both to prepare and prosecute an application and to develop a suitable system design, but would not have anticipated any need to expend additional capital to secure a performance bond prior to

³ See, FCC Handout, “Frequently Asked Questions On the *First Space Station Reform Order*,” July 8, 2003 (Question 30) (“the new procedures will be applied to V-band applications, but not to Ku-band NGSO applications”); Tom Tycz, Chief, Satellite Division, SSPI Luncheon: Satellite Regulatory Update, June 3, 2003 (response to panelist question).

commencing system construction. All of these applicants therefore had similar expectations concerning the costs they would incur to obtain an FCC license.

While the prospective imposition of an additional bond-posting requirement may be permissible in connection with an ultimate license grant, it is far from clear that the Commission may apply such a rule to current applicants on only an *ad hoc* basis, allowing some current applicants to proceed based on prior expectations, while significantly altering the regulatory terrain for others. Upsetting the settled expectations of one subset of existing applicants by increasing significantly the pre-construction costs that they initially anticipated, while not retroactive rulemaking *per se*, does produce a “secondary retroactive effect” by inequitably changing the future impact of past conduct – the costs to be incurred in successfully prosecuting a previously filed satellite application to license grant. If a secondary retroactive effect of an agency rule is unreasonable, then the rule, like any other, may be struck down as arbitrary or capricious.⁴ In this instance, the question is whether the Commission has reasonable grounds for applying its bond-posting requirement to some pending applications, but not to others.

The Commission itself has not provided any explanation for its disparity in treatment between the V-band and Ka-band NGSO processing rounds on one hand, and the Ku-band NGSO processing round on the other. Indeed, with respect especially to the situation of the Ka-band second-round NGSO applicants (which would be subject to the bond requirement) and the Ku-band NGSO applicants (which would not be subject to the bond requirement), no meaningful distinction exists. Both services are brand new, both have newly-minted service

⁴ See *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 220 (1988) (Scalia, J., concurring). See also *DIRECTV, Inc. v. FCC*, 110 F.3d 816, 826 (D.C. Cir. 1997), citing *Bell Atlantic Telephone Cos. v. FCC*, 79 F.3d 1195, 1207 (D.C. Cir. 1996).

rules in place that allow for the licensing of all pending applications, and the systems in each service are expected to compete directly with both the other systems in the round and with the systems in the other service.

In the case of the V-band applications, the situation is a little different, but no less significant. Although the allocation and services rule proceedings for the V-band applications are not as mature as those for either the Ku-band NGSO or Ka-band NGSO services, the applications have been pending for six years. Moreover, some V-band applicants – including Northrop Grumman – have spent that entire time working tirelessly, through countless meetings at the International Telecommunication Union (“ITU”) and several Commission rulemaking proceedings, to provide the proper regulatory environment for their proposed systems. Application of the bond-posting requirement to the long-pending V-band applications unduly and severely penalizes those applicants whose applications remain pending through no fault of their own, while dozens of later-filed applications for services new and old have been prosecuted to grant and will not be subject to a bond requirement.

As a general proposition, it is difficult to discern how there is any distinction to be drawn among the groups of pending applications with respect either to the need for, or the efficacy of, efforts to discourage speculation and warehousing, *i.e.*, the bond posting requirement. This matter is of more than academic concern, inasmuch as the applications pending in the two processing rounds for which the Commission proposes to impose a bond were actually filed *before*, or at least contemporaneously with, significant numbers of other applications for which the Commission intends not to impose a bond, either because it has decided not to do so (Ku-band NGSO),⁵ or because these applicants were fortunate enough to

⁵ See FCC Public Notice, “Cut-off Established for Additional Applications and Letters of Intent in the 12.75-13.25 GHz, 13.75-14.5 GHz, 17.3-17.8 GHz and 10.7-12.7 GHz Frequency Bands,” Report No. SPB-141 (released

have had licenses granted prior to the adoption of the new rules (Ka-band GSO and others).⁶

The Commission therefore is arbitrarily imposing additional costs upon some prospective operators based solely on the fact that the Commission has taken a longer period of time to process their applications. To some extent, these disparities in processing time have already disadvantaged applicants by delaying their ability to implement service. Imposing additional economic obligations upon these potential competitors would only exacerbate this disadvantage, and potentially inhibit system implementation, without any evident countervailing benefit.

The Commission itself has conceded, indeed emphasized, that the new bonding and milestone requirements will not apply on a retrospective basis “to licenses *granted* before [the *First R&O*] was adopted.” *First R&O* at 107 (¶ 283) (emphasis in original). Regardless of the absence of additional anti-speculation safeguards for these licensees, however, the Commission has determined to eliminate the former anti-trafficking rules for these authorizations even without imposing the new bonding and revised milestone conditions. Thus, all pre-2003 applicants for satellite operating authority would share in the new benefits of greater ability to transfer unbuilt satellite systems, but within this group the V-band and second round Ka-band NGSO applicants would be uniquely and inequitably saddled with the additional cost burdens of the bonding requirement.

By limiting the bond requirement only to licenses granted as a result of applications filed after the recent satellite application freeze, the Commission would appropriately limit the impact of these new costs to those operators that had the opportunity to

November 2, 1998) (establishing January 8, 1999 cut-off date for Ku-band NGSO applications to be considered contemporaneously with the application of SkyBridge LLC).

⁶ See, e.g., *EchoStar Satellite Corp.*, 15 FCC Rcd 14300 (IB 2001); *GE American Communications, Inc.*, 15 FCC Rcd 14306 (IB 2001); *KaStarCom World Satellite, LLC*, 15 FCC Rcd 14322 (IB 2001); *Loral CyberStar, Inc.*, 15 FCC Rcd 14346 (IB 2001); *Pegasus Development Corp.*, 15 FCC Rcd 14378 (IB 2001); *Intelsat LLC*, 15 FCC Rcd 15460, 15521-22 (Appendix A) (2000) (authorizing Intelsat, *inter alia*, to occupy four additional orbital locations with new or in-orbit spacecraft).

take into consideration all of these costs prior to seeking a license. Moreover, limiting the license bond to prospective application would allow all companies that originally sought authorizations during the 1990s to proceed with their programs subject to similar license requirements and burdens.

In the case of the Ka-band and Ku-band NGSO applicants, reconsideration of the application of the bond-posting requirement to pending applications would ensure that identically-situated applicants are treated in an identical fashion.⁷ In the case of the V-band applicants (GSO and NGSO), reconsideration would ensure that applicants such as Northrop Grumman are not arbitrarily and inequitably penalized for the long process they have endured to provide a favorable technical and regulatory environment worldwide for the operation of their proposed systems.⁸

II. There Is No Sound Basis For Imposing A Bond-Posting Requirement Upon Satellite Licenses Ultimately Granted To Applicants That Have Already Spent Many Years Seeking Such Authority.

Under current circumstances, and regardless of either the merits of imposing a bonding requirement on new licensees, or the appropriate amount for such a bond, there does not appear to be any significant benefit to be gained from applying the bond requirement to applications that were already on file prior to the adoption of the new rules. The bond

⁷ See, e.g., *Melody Music, Inc. v. FCC*, 345 F.2d 730 (D.C. Cir. 1965) (similarly-situated applicants must be treated in similar fashion).

⁸ Employing the new bond-posting requirement in the long-pending V-band round would leave the remaining applicants in this round with very little incentive to continue prosecuting their applications. Indeed, several applicants have already sought dismissal of their applications, as well as a full refund of the processing fees paid, applying existing precedent. Any such dismissing applicant could later refile its application(s), and get a later ITU "bringing into use" deadline, without having a materially more difficult road to successful coordination. In the event that the Commission does not reconsider the retroactive application of the bond-posting requirement to pending applications, Northrop Grumman should be accorded the same treatment as other V-band applicants with respect to possible refund of its V-band application fees.

requirement poses no disincentive to speculative application filers because the applications have already been submitted, at not inconsiderable cost to the applicants both in terms of initial application fees and subsequent legal and engineering expenditures.⁹

Especially given the current condition of the satellite industry,¹⁰ there is certainly nothing to be gained by imposing higher start-up costs on companies that have persevered for more than a half-decade in prosecuting their applications. The demand for new satellite authorizations has abated significantly since the late 1990s, when the Commission first began to consider reforming its licensing process.¹¹ While these market changes rightly did not deter the Commission from proceeding with necessary reforms, they should cause the Commission to rethink its initial determination to apply the bonding requirement to any applications pre-dating the new rules. While improving market conditions may someday revive the interest of speculators in seeking satellite licenses, the current difficulties being experienced by the industry as a whole have left the potential for such conduct at an historical low point. Those applicants that have continued to seek FCC authority during this significant downturn cannot reasonably be viewed as mere speculators, and should not have their perseverance and patience “rewarded” with additional costs of doing business.

⁹ The filing fee for Northrop Grumman’s V-band NGSO application alone was more than a quarter of a million dollars (\$255,080). See FCC File No. SAT-LOA-19970904-00080.

¹⁰ See, e.g., Barnaby J. Feder, “Long Slump in Satellites Hurts Boeing and Loral,” *International Herald Tribune*, at 11 (July 16, 2003).

¹¹ For example, many previously granted Ka-band satellite authorizations have been returned to the FCC for cancellation. See, e.g., Letter from Gerald Musarra, Vice President, Trade and Regulatory Affairs, Lockheed Martin, to Marlene H. Dortch, Secretary, FCC (dated August 2, 2002) (relinquishing licenses for Call Signs S2332, S2333, S2334, S2335 and S2336); Letter from John P. Janka, Counsel to Hughes, to Marlene H. Dortch, Secretary, FCC (dated December 20, 2002) (relinquishing licenses for Call Signs S2186 and S2189); and Letter from Henry Goldberg, Counsel to PanAmSat, to Thomas S. Tycz, International Bureau (dated January 14, 2003) (relinquishing licenses for Call Signs S2192, S2220, S2221, S2223, S2224, S2225, S2226, S2425, S2426, S2427, S2428, and S2429).

The most appropriate approach to application of the new bonding requirement is to impose this new regulation on none of the pending applicants. This approach will allow the relatively small number of companies still pursuing new authority in the V-, Ka- and Ku-bands to proceed in a manner consistent with their original expectations without selectively imposing new cost burdens on some of them. This will further one of the Commission's most important regulatory goals – the promotion of vigorous competition among a variety of service providers.

Northrop Grumman notes that the bond requirement determination for second-round Ka-band NGSO FSS systems was implemented in the Commission's post-*First R&O* decision establishing policies and service rules for this round.¹² Northrop Grumman intends to seek reconsideration of this decision's retroactive and selective application of the bonding requirement in due course, once this decision is published in the Federal Register.

Conclusion

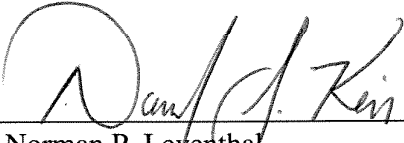
For all of the foregoing reasons, Northrop Grumman urges the Commission to reconsider its initial decision to impose the new license bond requirement selectively upon pending applicants, and to determine that the requirement will not apply to any applications filed before the new rules became effective. In the case of the Ka-band and Ku-band NGSO applicants, reconsideration of the application of the bond-posting requirement to pending applications would ensure that identically-situated applicants are treated in an identical fashion. In the case of the V-band applicants (GSO and NGSO), reconsideration would ensure that applicants such as Northrop Grumman are not arbitrarily and inequitably penalized for the long

¹² See *Establishment of Policies and Service Rules for Non-Geostationary Satellite Orbit, Fixed-Satellite Service in the Ka-band*, FCC 03-137, slip op. at 2 & 16 (¶¶ 3 & 47) (released July 9, 2003).

process they have endured to provide a favorable technical and regulatory environment worldwide for the operation of their proposed systems.

Respectfully submitted,

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